

Fail to Comply with Domestic Preference Rules at Your Peril

Alert

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By Susan Warshaw Ebner & Steve Lindemann

Federal government contracts and grants require contractors to certify the delivery of domestic end products unless an exception applies. Domestic preference rules include the Buy American Act (BAA) and Trade Agreements Act (TAA). Recently, additional domestic preference requirements, such as Build America, Buy America and the Buy America Act, have also been applied to projects funded through the Infrastructure Investment and Jobs Act or energy savings contracts under the Inflation Reduction Act. Trillions of dollars in grants and contracts have been awarded on the condition that the federal funds spent on construction materials used in these projects will comply with applicable domestic preference laws and regulations.

Under these domestic preference provisions, contractors and grantees must certify their compliance accurately and completely. Even without a written certification, the delivery or installation of products under these contracts or grants may be viewed as an implied certification of compliance with domestic preference rules.

Failure to deliver compliant products or to accurately certify compliance with these laws and regulations has been the target of Federal False Claims Act (FCA) investigations and prosecutions. The FCA authorizes treble damages plus penalties for each FCA violation. Penalties currently range from \$13,946 to \$27,894 per claim.

Recently, LED Lighting Solutions, LLC settled an FCA claim and paid \$300,000 to the government for failure to comply with domestic end product requirements under the BAA and TAA. The U.S. Department of Justice [press release](#) states that LED Lighting certified its compliance with the TAA in its letter of supply submitted for its General Services Administration Multiple Award Schedule contract without identifying

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any foreign end products on its product list. The press release notes that LED Lighting falsely certified the compliance of its end products under the BAA when, in fact, some of its products were foreign end products. In one instance, LED Lighting shipped products directly from China to the procuring agency. The settlement also required LED Lighting to withdraw its two contract appeals pending before the Armed Services Board of Contract Appeals in which LED Lighting challenged the Army's termination of its contract due to BAA and FCA violations.

Notably, the Federal Acquisition Regulation, 48 C.F.R. part 42.15, requires the reporting of "for cause" terminations of government construction contracts in the Contractor Performance Assessment Reporting System (CPARS). CPARS reports of such terminations must be considered by contracting officers in evaluating contractors for future award decisions for a period of up to six years.

If you have questions about domestic preference matters or are contacted by any government agency about these issues, you should contact counsel.

CONTACTS

Susan Warshaw Ebner

Steven R. Lindemann

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